SUPREME COURT, U. S.

FILED

MAY 1 1970

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 141

JOSEPH ROBERT STEVEN BROSSARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1970. See Appendix B to this petition.[1]

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to ..... 1970.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

Petitioner raises constitutional questions. They involve the Fifth Amendment clause concerning due process.

Involved here is the agency's regulation, as interpreted and applied that a late [after an order to report for induction] crystallization of conscientious objection to military service is not a circumstance beyond his control.

The Fifth Amendment complaint, in brief, is that (1) the administrative agency made an ipse dixit conclusion, one without basis in fact, and (2) that involved here is a conflict between the Act and the agency regulation.

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1. This petitioner's Petition for Rehearing was denied by the Court of Appeals on March 30, 1970. See Appendix C to this petition.

The questions presented here were raised in the trial court by written Motion for Judgment of Acquittal and briefed to the Court of Appeals for the Ninth Circuit.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, § 456 (j) of the Universal Military Training and Service Act of 1951, and the agency regulation, 32 C.F.R. § 1625.2. They are set forth in Appendix D.

5. STATEMENT OF THE CASE

The indictment charged Brossard with a violation of the Universal Military Training and Service Act of 1951 for refusing to submit to induction.

Brossard pleaded Not Guilty and was tried by the Honorable Albert Lee Stephens, Jr., sitting alone without a jury. He was found guilty and sentenced.

6. THE FACTS

The facts are found in the complete Selective Service System file[2] of the petitioner and the oral testimony in the trial court.

Petitioner registered in July 1964 in Canada. When he came to California he was given his permanent board and was renumbered. The subsequent minutes of actions are found on Ex. 11.

The pertinent facts of his processing are that after his student status expired he was sent an Order to Report for Induction on November 15, 1966, the board having mailed it on October 26, 1966 [Ex. 61].

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2. This file, Government's Exhibit No. 1 is pencil paginated at the bottom of each sheet and is hereinafter referred to by sheet numbers, such as [Ex. 1].

On November 10, 1966, he handed in a written request for the Special Form for Conscientious Objector, SSS Form No. 150 [Ex. 61]

On the same day he handed in the following letter to the board's clerk. "I herewith hand you my special form and request that you reopen my classification to give me a hearing before you determine my sincerity." [Ex. 63]. This sheet shows the following notation: "11/10/66 Postponement of induction or reopening of classification denied." [Ex. 63].

In his Special Form for Conscientious Objectors, petitioner had presented a non-frivolous prima facie case. This Special Form is on sheets 64-68 of the exhibit.

7. REASONS FOR GRANTING WRIT

A national decision is required on constitutional problems, one that has left the lower courts divided.

Involved here is the agency's regulation, as interpreted and applied, that a late [after an order to report for induction] crystallization of conscientious objection to military service is not a circumstance beyond his control.

Two Fifth Amendment problems are presented: One, a conflict between the Act and the agency regulations, and Two, an interpretation of the nature of conscientious objections, an interpretation that has divided the Courts of Appeals during the last past two years, on this question: is a conscientious objection that crystallizes only after the mailing of an Order to Report for Induction, a change of status "beyond the control of the registrant," and therefore within the provided exception to the said agency "dateline" regulation?

The Fifth Amendment questions presented are of an importance greater than one individual's fate. The ques-

tions are national because the reach of the Selective Service System is into every hamlet, the "calls" for induction show every indication of continuing, and the percentage of registrants professing conscientious objections to war is not decreasing, therefore numerically many persons are affected.

The administrative agency's handling of these claims, and their often too summary disposition by the courts is due to insufficient guide lines, one conforming to the demands of the Fifth Amendment.

8. ARGUMENT

Because petitioner was a "late claimant" for conscientious objection status [he filed his claim after the Order to Report for Induction], petitioner was denied the important Fifth Amendment rights of equal protection and due process of law.

The Selective Service System regulations discriminate against "late claimants." Yet the intention of Congress is clear. Conscientious objectors are to be exempt if they meet the standard established by Congress. The Selective Service System regulations in this record are in conflict with the will of Congress as enacted into law and thus are invalid.

Further, the local board gave no rational reason for denying the claim of petitioner. It has been held that when a local board denies a conscientious objector classification in a situation where a prima facie case has been presented there must be a rational basis for such action and the local board must state its reasons for such action. *United States* v. *Haughton,* 413 F.2d 736, 9th Cir. (1969). This was not done in case of petitioner.

The Court of Appeals merely concluded ipse dixit, that Brossard was insincere, and like the trial court and the Selective Service System, gave no supporting facts.

Petitioner Brossard believes that facts are required to support any conclusion. A naked conclusion is not enough; that the Fifth Amendment requires a factual basis.

Many courts are so expressing themselves. A hearing should be granted, on certiorari, to have this point thoroughly argued.

The Selective Service System made an ipse dixit conclusion in denying the claim of petitioner in regards to his claim for a I-O conscientious objection classification. Such action violated petitioner's Fifth Amendment rights.

In *Dickinson* v. *United States,* 74 S.Ct. 152 (1953) at 157, the Supreme Court partially catalogued the many means by which local boards could test the truthfulness of a registrant's claims, and page 158, where it denounced "dismissal of the claim solely on the basis of suspicion and speculation." As Mr. Justice Jackson stated bluntly the holding of the *Dickinson* Court (in his dissent):

> "Under today's decision, it is not sufficient that the board disbelieve the registrant. The Board must find and record affirmative evidence that he has misrepresented his case. . . ." (74 S.Ct. 152, 159)
> This was not done in petitioner's case.

As the U. S. Court of Appeals for the Fifth Circuit stated the matter in a case concerning a I-O conscientious objector claim, *William* v. *United States,* 216 F.2d 350 (1954) at 352:

> "If there was no evidence before the board to refute the defendant's professed belief and if that belief was sincere on his part, then under the Act of Congress,

he was exempt from training and service. As stated, we have found no such evidence in the record."

Despite petitioner's prima facie claim, his classification was not reopened. By holding that it did not reopen petitioner's classification, the local board deprived petitioner of important appellate rights. As Chief Judge Fred J. Nichol pointed out in *United States* v. *Melrose,* CR 68-124S, U.S.D.C., So. Dist., S.D., on December 4, 1969, in a conscientious objector case:

"By holding that it did not reopen the defendant's classification, the board precluded him from appealing its decision as the determination not to reopen is not appealable. *Robertson* v. *United States,* 404 F.2d 1141 (5th Cir. 1968). However, a reopening and consequent determination of the claim on its merits gives the defendant the right to appear before the board thereafter and to appeal the decision to the administrative appeal boards. Davis v. United States, supra. It is apparent, therefore, that the determination not to reopen is in itself a separate and distinct decision of 'independent procedural significance' even though the board may, after reopening, give the registrant the same classification as previously held. Robertson v. United States, supra. The board cannot actually determine the claim on its merits, decide not to reclassify the registrant, and then label its action a determination not to reopen, thereby denying the registrant precious appearance and appeal rights. *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967)."

This is what happened in the case of petitioner.

CONCLUSION

For the reasons given, certiorari should be granted and the judgment should be reversed.

Respectfully,

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